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In the Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, SECRETARY OF COMMERCE,
AND
DANIEL B. LEVINE, ACTING DIRECTOR,
BUREAU OF THE CENSUS, PETITIONERS

v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondent acknowledges (Br. in Opp. 7) that the Census Act requires a "full measure of confidentiality" for all census data. He asserts, however, that the list of addresses compiled by the Bureau of the Census to conduct the 1980 decennial census reveals no personal information about individual respondents (*id.* at 2, 4-7). Accordingly, in respondent's view, that list is not confidential information

or data for purposes of the sweeping confidentiality provisions of the Census Act. See 13 U.S.C. 8(b) and 9(a).[1] This syllogism is both legally and factually flawed.[2]

First, disclosure of the list of addresses sought by respondent, even if it were redacted of all other information, may in fact reveal substantial personal information about individuals who have responded to Bureau inquiries. That list constitutes the Bureau's determination of all *residences* in Essex County. The Bureau compiles its list through various techniques, including postal checks, preenumeration canvassing by census personnel, and direct inquiries during the enumeration process itself. A comparison of the Bureau's list of individual residences with respondent's list of residences culled from its tax records might well disclose various untaxed or unlawful residences, including housing that Essex County considers to be abandoned or solely commercial in nature. Particularly where the Bureau learned of an unlawful residence through the voluntary cooperation of the resident under a pledge of confidentiality, the disclosure ordered by the courts below would wholly undermine the purpose of the Act's confidentiality provisions.

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[1]Respondent no longer contends that the disclosure ordered in this case is authorized by Section 9(a)(1) of the Act as publication or use of census data for the Bureau's "statistical purposes."

[2]Respondent also suggests that Essex County "repeatedly offered to make its computerized address data available to the Census Bureau" (Br. in Opp. 2). We are informed that the Bureau has no record of receiving any such offer prior to the commencement of this litigation. Moreover, the disorganized list of addresses that respondent belatedly asked the Bureau to compare with its data did not comply with the local review program guidelines and would not have been very useful since tax lists ordinarily do not specify the number of housing units in a given structure (C.A. App. 43, 55).

Moreover, even if the publication of the Bureau's list of addresses would not reveal any personal information, the courts below erroneously concluded that the Bureau must disclose its lists to respondent. The Census Act flatly bars the disclosure of any "information reported by, or on behalf of, any particular respondent" (13 U.S.C. 8(b)) or "any publication whereby the data furnished by any particular establishment or individual under this title can be identified" (13 U.S.C. 9(a)(2)). Nothing in the language of the Act suggests that only personally revealing information must be kept confidential. Rather, the broad terms of the Act, as well as the legislative history canvassed in our petition (Pet. 7-8, 12-16), make clear that any data, including a list of addresses, which relate to a particular individual or establishment, or "which might disclose information reported by, or on behalf of, any respondent" must be kept strictly confidential (S. Rep. No. 94-1256, 94th Cong., 2d Sess. 4 (1976)). Otherwise, if the courts were free to determine what kinds of individual census data were sufficiently personal to warrant protection, the Bureau would be unable to obtain the public cooperation and participation that is essential to the census process. See, *e.g.*, *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 218 (1961); *McNichols* v. *Klutznick*, No. 80-2023 (10th Cir. Mar. 17, 1981), slip op. 3-4; *Seymour* v. *Barabba*, 559 F. 2d 806, 808 (D.C. Cir. 1977).

2. Respondent further argues (Br. in Opp. 8) that the decision below is not in conflict with the decision of the District of Columbia Circuit in *Seymour* v. *Barabba*, *supra*, because the plaintiff in that case sought "substantive information" as well as a list of addresses. But the *Seymour* decision neither relies on the breadth of the plaintiff's request nor indicates that the plaintiff was entitled to a list of addresses culled from other census material. To the contrary, the court of appeals held that the Census Act constitutes "a flat barrier to disclosure" of the "names and

addresses * * * utilized by the Bureau of the Census in fulfilling its duties under the federal census laws * * *." 559 F. 2d at 807-808.

Furthermore, the conclusion of the courts below regarding the confidentiality of the Bureau's address lists is squarely in conflict with the Tenth Circuit's recent decision in *McNichols* v. *Klutznick, supra*, reprinted at App., *infra*, 1a-5a. Like the district court in this case, the district court in *McNichols* both ordered the Bureau to disclose a list of addresses that it had prepared in connection with the decennial census and directed the Bureau to swear the local government's personnel to observe the confidentiality provisions of the Act in evaluating the address list. Observing that the district court's limited disclosure order "tacitly acknowledged that it constituted an evasion of congressionally mandated confidentiality" (*id.* at 3a), the court of appeals reversed. The court held that "the history of the Census Act and the broad language of the confidentiality provisions * * * make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality" (*id.* at 3a-4a). Just as the City of Denver is not entitled to discovery of the Bureau's address lists in order to challenge the accuracy of the decennial census, so too neither Essex County nor any other member of the public is entitled to public disclosure of such lists under the Freedom of Information Act, 5 U.S.C. 552.

For these reasons and the reasons stated in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

DOJ-1981-04

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WILLIAM H. McNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, et al.,

Plaintiffs-Appellees,

v.

PHILIP M. KLUTZNICK, in his official capacity as the Secretary of the U. S. Department of Commerce, et al.,

Defendants-Appellants.

FILED
United States Court of Appeals
Tenth Circuit
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No. 80-2023

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Case No. 80-C-1151)

Before BARRETT, DOYLE and McKAY, Circuit Judges.

McKAY, Circuit Judge.

The action underlying this properly certified interlocutory appeal is a challenge to the population count reached by the Bureau of Census for the City of Denver, Colorado. The focal point of the litigation at this stage is the plaintiffs' charge that the Bureau has "over-counted" the number of vacant housing units in Denver. The plaintiffs, asserting their interests in the census count's effect on congressional representation and in various federal grants based on census figures, sought discovery of the Bureau's list of addresses of Denver's allegedly vacant housing units. The information sought by the plaintiffs is derived from the Bureau's questionnaire program and follow-up interviews. The Bureau resisted discovery because of the express prohibitions of 13 U.S.C. § 9(a) which provides:

> 9. Information as confidential; exception
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
>
> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained

> shall be immune from legal process, and shall not, without consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

Notwithstanding the express language of the statute and the "emphatically expressed intent of Congress to protect census information," *Seymour* v. *Barabba*, 559 F. 2d 806, 809 (D.C. Cir. 1977), the district court:

> ORDERED that the defendants shall produce the FARs[1] for the City and County of Denver to the plaintiffs, or the defendants may, alternatively, produce a list derived from the FARs which simply lists the addresses of those living units in the City and County of Denver which the Bureau has determined to have been vacant on April 1, 1980 . . . .

Record, vol. 1, at 37. The court's order tacitly acknowledged that it constituted an evasion of congressionally mandated confidentiality by directing that plaintiffs' personnel who received the address lists should be sworn to the same oath of secrecy and confidentiality as required by the personnel of the Bureau of Census and by otherwise limiting any further publication of the ordered information.

There can be no question that Congress has the power to make census information gathered at its direction immune from discovery. Both the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid

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[1] FARs are "follow-up address registers" representing updated master address lists which include the Bureau's classification of housing units as either vacant or occupied.

immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality. See *Seymour* v. *Barabba*, 559 F. 2d 806 (D.C. Cir. 1977).

The plaintiffs contend, however, that their request for a list of vacant housing units should be honored. The principal thrust of the plaintiffs' argument is that the information should be released because without it they cannot meaningfully challenge the Bureau's determination of Denver population. Congress has neither made nor implied such an allowance in its prohibition and no authority is given for the notion that Congress is constitutionally required to yield to such an argument. The government has promised its citizens that census information will be kept confidential. 13 U.S.C. §§ 8(b); (c), 9(a). In exchange for and in reliance on this promise, citizens cooperate with the government's census taking efforts relatively free of inhibitions that might otherwise distort their disclosures. In these times when confidence in the government's resolve to keep its promises to its citizen is not notorious, we should not readily find excuses to abandon or prohibit the enforcement of those promises. We do not believe that in the face of the congressional prohibitions, the trial court has authority to substitute its own techniques for protecting the confidentiality mandated by the statute.

The plaintiffs also suggest several interpretations of § 9(a) that lend support to the district court's order. We do not believe that the statute permits us to conclude that the plaintiffs' intended use constitutes one of the "statistical purposes for which [the information sought] is supplied." 13 U.S.C. § 9(a)(1). Nor are we impressed that the word "publication" contained in 13 U.S.C. § 9(a)(2) should be so narrowly construed as to suggest it means only advertising the information in some press or broadcast media. The

word obviously means disclosure to anyone other than those persons authorized in the statute itself.

The plaintiffs have argued that the information sought is not within § 9(a)'s ambit because it was not "furnished" by respondents. We do not think that the word "furnished" should be so narrowly construed, particularly in light of the provisions of § 8(b) which make clear that the prohibition is against the disclosure of "information reported by" respondents. The record clearly reflects that the information ordered released was disclosed by Census respondents.[2]

No doubt the cities and counties and their residents face difficult financial problems which may be substantially affected by the uses to which census data will be put. Their remedies, if any, must lie in some device other than devices expressly prohibited by a congressional exercise of constitutional authority. The order of the district court violates the provisions of 13 U.S.C. § 9 and must therefore be reversed.

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[2]Plaintiffs have also argued that the challenge to the court's order is moot or that § 9's requirements have been waived because of some alleged breaches of the prohibitions of § 9 by Bureau employees in New Mexico. The record reveals that there is no merit to this argument.